

HON. JAMAL N. WHITEHEAD

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VALVE CORPORATION,

Plaintiff,

v.

LEIGH ROTHSCHILD, ROTHSCHILD
BROADCAST DISTRIBUTION SYSTEMS,
LLC, DISPLAY TECHNOLOGIES, LLC,
PATENT ASSET MANAGEMENT, LLC,
MEYLER LEGAL, PLLC, AND SAMUEL
MEYLER,

Defendants.

Case No. 2:23-cv-1016

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

Complaint Filed: 07/07/2023

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I. INTRODUCTION

Defendants’ motion almost entirely ignores the legal standard for a motion to dismiss. Instead of arguing beyond a doubt that Valve’s First Amended Complaint (“Complaint,” Dkt. 23) contains no set of facts that supports their claims, Defendants focus their motion on disputing Valve’s factual allegations and improperly weighing the evidence. Valve’s factual allegations in its Complaint, however, must be taken as true. Any factual dispute identified by Defendants confirms that Defendants’ motion should be denied and that the case should proceed to discovery.

Defendants only arguments appropriate for resolution on the pleadings are based on Defendants’ mischaracterization of the Complaint and the 2016 Global Settlement and Licensing Agreement (“GSLA”). When the appropriate legal standards and provisions of the GSLA are applied to the facts contained in Valve’s Complaint, each of Defendants’ arguments fail. As described below, Valve has continued to comply with the GSLA, despite Defendants’ repeated material breaches of the same. While Defendants attempt to recast their bad faith assertion of patent infringement as “clerical errors” or “compliance” with the GSLA, Defendants’ motion confirms that they have no intention of policing their own actions. Without Court intervention, Defendants will continue to force Valve to litigate patent infringement lawsuits asserting patents Valve already has a license to.

II. ARGUMENT

A. The GSLA Permits Valve to Challenge the Validity and Enforceability of the ’221 Patent Because Defendants Asserted the ’221 Patent Against Valve

Defendants argue that Valve is barred by the GSLA from bringing Counts I and II of unenforceability and invalidity of the ’221 Patent. Defendants are incorrect. Counts I and II are allowed under the GSLA. Moreover, Valve has a reasonable apprehension that Defendants will file a lawsuit against Valve for infringement of the ’221 Patent—despite the GSLA barring such lawsuits—due to Defendants’ explicit threats to do so and Defendants’ repeated material breaches of the GSLA. Thus, there is a justiciable case or controversy regarding the invalidity and unenforceability of the ’221 Patent.

First, Counts I and II do not violate the GSLA. The GSLA explicitly permits Valve to challenge the validity and unenforceability of the '221 Patent when Defendants assert it against them: “[N]othing in this Paragraph or in this Agreement shall prevent Licensee . . . from asserting that any of the Licensed Patents are invalid, not infringed or unenforceable if the Licensed Patents are asserted against Licensee” Dkt. 23-1, § 2.3. As alleged in the Complaint, Defendants asserted the '221 Patent against Valve in the June 2023 demand letter. Dkt. 23, ¶¶ 27-33. In that demand letter, Defendants threatened to “file[] . . . their complaints” for patent infringement, attaching “preliminary claim charts” “that have been prepared in anticipation of litigation” and which noted Valve as a “Defendant.” Dkt. 23-8. On the face of the Complaint, Valve has plausibly alleged that Defendants asserted¹ the '221 Patent against it. *See, e.g., Asia Vital Components Co. v. Asetek Danmark A/S*, 837 F.3d 1249, 1253-55 (Fed. Cir. 2016) (holding that listing asserted patents in a demand letter that referenced the sender “enforced its IP” was sufficient assertion of patent infringement to confer standing.); *see also Hewlett-Packard Co. v. Acceleron LLC*, 587 F.3d 1358, 1362-64 (Fed. Cir. 2009) (holding that twice contacting a target, identifying patents as relating to a target’s products, and a target’s statement of disagreement is sufficient to confer declaratory judgment jurisdiction). Thus, under Section 2.3 of the GSLA, Valve is permitted to seek a declaration of invalidity and unenforceability of the '221 Patent. And there is a judicable case or controversy because the June 2023 demand letter is “an explicit threat” by Defendants that “creates a reasonable apprehension on behalf of [Valve] that it will face an infringement suit” based on Valve’s “present activity” offering the Steam app. *Gen-Probe Inc. v. Vysis, Inc.*, 359 F.3d 1376 (Fed. Cir. 2004), *abrogated on other grounds by MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007).

¹ To the extent that Defendants attempt to argue ambiguity regarding the word “assert,” the meaning of ambiguous contract language is inappropriate for review on a motion to dismiss because discovery could uncover extrinsic evidence to resolve that ambiguity. *See Bedrosian v. Tenet Healthcare Corp.*, 208 F.3d 220 (9th Cir. 2000) (holding that resolution of contractual claims on a motion to dismiss is only proper if the terms are unambiguous); *see also Ticey v. Fed. Deposit Ins. Corp.*, No. C22-1110 MJP, 2023 WL 2742055, at *3 (W.D. Wash. Mar. 31, 2023), *reconsideration denied*, No. C22-1110 MJP, 2023 WL 3382506 (W.D. Wash. May 11, 2023) (stating that extrinsic evidence can be used to ascertain the true intentions and agreement of the parties for ambiguous claim language).

1 *Second*, even if Valve’s actions were somehow in violation of the GSLA (they are not), the
 2 GSLA will only divest the Court of jurisdiction to hear Counts I and II if the parties “have each
 3 fulfilled their obligations without material breach.” *Gen-Probe*, 359 F.3d at 1381. The Federal
 4 Circuit in *Gen-Probe* dismissed the Plaintiff’s declaratory judgment claims precisely because
 5 without a material breach, “no facts [] have arisen since the [parties’] license to give Gen-Probe a
 6 reasonable apprehension of a lawsuit.” *Id.* In this case, the particular facts alleged in Valve’s
 7 Complaint point to **multiple** material breaches in the GSLA that placed Valve in “a reasonable
 8 apprehension of a lawsuit.”

9 Defendants’ repeated material breaches of the GSLA prevent Defendants from relying on
 10 that agreement to wrest jurisdiction from this Court. In the Complaint, Valve has alleged how
 11 Defendant has committed material breaches of the GSLA no less than three times in
 12 approximately a year.

- 13 • Defendants’ employee, Daniel Falcucci, messaged multiple Valve employees to
 14 execute a new, additional license agreement to Defendants’ “inventory catalog.” Dkt
 23, ¶ 15. That inventory catalog included patents already covered under the GSLA. *Id.*
- 15 • When Valve declined to engage in additional negotiations with Falcucci, Display
 16 Technologies disregarded the covenant not to sue and filed a lawsuit accusing Valve of
 17 infringing U.S. Patent No. 9,300,723. *Id.*, ¶ 20. Valve already had a license to U.S.
 18 Patent No. 9,300,723 under the GSLA. *Id.*, ¶ 22. Valve was forced to undertake the
 expense of reviewing the complaint, comparing the asserted patents to the GSLA, and
 writing opposing counsel to inform them that Valve already had a license. *Id.*, ¶ 23;
 Dkt. 23-6.
- 19 • Defendants sent a demand letter in June 2023 threatening to sue Valve for alleged
 20 infringement of the ’221 Patent, another patent Valve already licensed. *Id.*, ¶ 27. The
 21 June 2023 demand letter attached claim charts “prepared in anticipation of litigation”
 and gave Valve nine days to respond before the Defendants would “assume that Valve
 would prefer to litigate” the ’221 Patent. Dkt. 23-8.

22 Defendants have not withdrawn or repudiated any of their demands made in violation of the
 23 GSLA, including the ones that led to this present suit. Instead, Defendants doubled down and
 24 stated their clear intent to assert counterclaims of infringement of the ’221 Patent against Valve in
 25 any Answer they file in this case. Dkt. 28, ¶ II.5 (Parties’ Joint Status Report).

26 Defendants’ June 2023 demand letter was an unambiguous threat to file a patent
 27 infringement lawsuit asserting the ’221 Patent. Based on Defendants’ repeated disregard of their

obligations under the GSLA, Valve had a “reasonable apprehension” that it will be sued for infringing the ’221 Patent, despite the fact that Defendants should be barred from doing so. *Gen-Probe*, 359 F.3d at 1380. The existence of the GSLA cannot negate Valve’s reasonable apprehension in light of Defendants’ repeated material breach of the agreement, including doing the exact same thing in the past that it threatened to do in June 2023: filing a patent infringement lawsuit asserting patents to which Valve is already licensed. Dkt. 23, ¶ 33.

The cases that Defendants cite, *Dow Jones* and *Benitec*, do not support Defendants’ position because neither involve breach, much less repeated breaches, of a covenant not to sue. *See Dow Jones & Co. v. Abblaise Ltd.*, 606 F.3d 1338, 1345 (Fed. Cir. 2010); *Benitec Australia, Ltd. v. Nucleonics, Inc.*, 495 F.3d 1340, 1347-48 (Fed. Cir. 2007). In *Dow Jones* the parties disputed whether the covenant not to sue covered Dow Jones’ affiliates and subsidiaries; there were no allegations regarding Abblaise breaching the covenant by asserting the patent against Dow Jones directly. 606 F.3d at 1348-49. In *Benitec*, the Federal Circuit found no case or controversy because Nucleonics’ present activities were not and could not be infringing until Nucleonics filed a new drug application. 495 F.3d at 1346-47. Here, there is no dispute that Defendants accuse Valve’s present activities of infringing the ’221 Patent. *See, e.g.*, Dkt. 23-8.

Defendants’ motion to dismiss Counts I & II should be denied.

B. The Complaint Plausibly Alleges that Defendants Breached the GSLA

Defendants’ arguments that they did not breach the GSLA rely on self-serving statements contradicting factual allegations in the Complaint. The Court, however, must take as true all of Valve’s allegations in the Complaint. It is inappropriate to consider Defendants’ new factual assertions outside of the Complaint during a motion to dismiss. Moreover, as explained below, Defendants’ new assertions are incorrect or dubious at best.

First, regarding Defendants’ breach of Section 3.1 of the GSLA, Defendants attempt to contradict Valve’s allegations in the Complaint by reframing their demand to “explore a potential resolution to” their allegations of infringement as not “demand[ing] any payment.” Dkt. 27 at 13. Yet Valve alleges that “[t]he ‘potential resolution’ and ‘resolution’ discussed in the 2023 demand

letter send by Meyler on behalf of Rothschild and RBDS is a monetary payment for additional rights to patents to which Valve is already licensed, including the '221 Patent.” Dkt. 27, ¶ 71.² Valve’s factual allegation must be accepted as true. *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014) (“In reviewing a motion to dismiss pursuant to Rule 12(b)(6), we must accept as true all factual allegations in the complaint.”). Defendants’ self-serving statements are outside of the pleading and thus inappropriate to consider during a motion to dismiss. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018) (“Generally, district courts may not consider material outside the pleadings when assessing the sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.”). Taken as true, Defendants’ demand for monetary payment is a violation of Section 3.1 states of the GSLA, which grants Valve a “perpetual, irrevocable, royalty-free, fully paid-up, worldwide license” and requiring “[n]o royalties or additional payments of any kind . . . in order to maintain this Agreement in force.” Dkt. 23-1, § 3.1.

Second, regarding Defendants’ anticipatory breach of Section 3.2 of the GSLA, Defendants argue that Valve has not “alleged facts sufficient to support the claim that RBDS would have sued Plaintiff, or maintained a suit against Plaintiff had one been filed, *once learning that the '221 patent was subject to the GSLA.*” Dkt. 27 at 13 (emphasis added). Defendants’ argument proves the point—Defendants have never been willing to ensure their own compliance with the GSLA. Instead, Defendants place the onus on *Valve* to inform Defendants that Defendants have breached the GSLA. Only then would Defendants act. Moreover, Defendants’ subsequent compliance with the GSLA after breaching the agreement does not negate the breach. Defendants’ argument does not amount to an assertion that “no set of facts support [Valve’s] claim that would entitle [Valve] to relief.” *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1004 (9th Cir. 2008). Instead, Defendants’ argument that only once Valve had informed them of their breach, they allegedly

² It is difficult to fathom what “potential resolutions” would convince non-practicing entities such as Defendants to forego patent infringement claims besides monetary payments. Indeed, since 2022, Defendants have been seeking more money from Valve for a renegotiated license to Rothschild’s patents. Dkt. 23-5.

1 would have acted differently.³

2 On the face of the Complaint, Valve alleged sufficient facts to plausibly support a claim for
3 anticipatory breach. “Under Washington law, an anticipatory breach occurs when a party to a
4 bilateral contract either expressly or impliedly repudiates the contract prior to performance.”
5 *Wyckoff Farms, Inc. v. Indus. Control Concepts, Inc.*, No. 4:20-CV-5095-TOR, 2020 WL
6 13490269, at *3 (E.D. Wash. Oct. 27, 2020) (citing *Wallace Real Estate Inv., Inc. v. Groves*, 124
7 Wash. 2d 881, 898 (1994)). Valve alleged, “RBDS made a positive statement indicating distinctly
8 and unequivocally that it would not substantially perform its obligations under the covenant not to
9 sue without receiving additional monetary payment that goes beyond Valve’s payment obligations
10 under the [GSLA].” Dkt. 23, ¶ 74; *see also id.*, ¶¶ 27-33, 67-73. Valve described how RBDS
11 expressly repudiated the GSLA by announcing its intention to sue Valve in the June 2023 demand
12 letter. Dkt. 23, ¶¶ 67-71, 73-74. RBDS’s intention in the June 2023 was clear: RBDS had created
13 infringement contentions “in anticipation of litigation” and if Valve did not respond to the June
14 2023 demand letter within nine days, the Defendants would understand that “Valve preferred to
15 litigate.” Dkt. 23-8; *see also id.* (“[M]y clients are willing to delay the filing of their complaints as
16 long as they feel that Valve is working toward a resolution in good faith.”). Yet Valve had already
17 resolved any and all claims related to the ’221 Patent by signing the GSLA. Announcing its
18 intention to breach the GSLA by filing a complaint alleging infringement of the ’221 Patent within
19 nine days is a clear repudiation of RBDS’s obligations under the agreement.

20 *Third*, with regards to Display Technologies breach of the GSLA, Defendants first take
21 issue with the characterization of Mr. Falcucci’s correspondence. Valve’s allegations, however,
22 are presumed to be true, and any factual dispute should not be resolved at a motion to dismiss.
23 *Retail Prop. Tr.*, 768 F.3d at 945. Moreover, Defendants’ assertions that “a demand letter . . . is

24 ³ Defendants claim that they would act in good faith once informed of their breach is belied by their
25 actions after the filing of this lawsuit. This lawsuit informed Defendants that the ’221 Patent was
26 subject to the GSLA and was being asserted against Valve in bad faith. Instead of withdrawing its
27 June 2023 demand letter or coming into compliance with the GSLA, Defendants filed three
28 retaliatory lawsuits in the Eastern District of Texas with the express intent of driving up Valve’s
litigation expenses and informed Valve of their intent to bring counterclaims asserting the ’221
Patent against Valve. Dkt. 28, ¶ II.5 (Parties’ Joint Status Report).

not the same as filing a lawsuit” is irrelevant and does not foreclose Valve’s claims as a matter of law. As described above, a demand letter is an “assertion” under the GSLA and thus can be a breach of the GSLA. *Supra* § **Error! Reference source not found.** Defendants’ disputes regarding whether Mr. Falucci’s correspondence were a “demand” are fact-intensive issues of contract interpretation that should be subject to discovery and not ripe for adjudication on a motion to dismiss. *Thomas v. State Farm Mut. Auto. Ins. Co.*, No. C22-1730-JCC, 2023 WL 2611889, at*2 (W.D. Wash. Mar. 23, 2023) (“[I]t is black letter law that, at this stage, the Court must draw reasonable inferences *in Plaintiff’s* favor ... By urging the Court to interpret the [contract] in their favor, Defendant would ask the Court to do the opposite, which it cannot do on a Rule 12(b)(6) motion.” (citation omitted) (emphasis in original)).

Defendants next assert that Display Technologies was in full compliance with Section 3.5 of the GSLA because, when it was informed by Valve that it filed a lawsuit alleging infringement of a licensed patent, Display Technologies promptly dismissed its lawsuit. As discussed above, however, merely coming *back* into compliance with the GSLA does not negate the breach. For this reason alone, Defendants’ argument should be rejected.

Moreover, to support Defendants’ argument that they allegedly complied with the GSLA, Defendants mislead the Court by selectively quoting Section 3.5 and omitting the key language that confirms that section does not apply to lawsuits against Valve. Dkt. 27 at 14. Section 3.5 states “[i]n the event that Licensor brings a claim under the Licensed Patents against *any Licensee Third-Party*, or any entity that claims that the alleged infringing conduct arises out of any communication, integration, transaction, cooperation, or contractual obligation *with or on behalf of Licensee*” Dkt. 23-1, § 3.5 (emphasis added). The plain language of Section 3.5 does not apply to suing Valve. Instead, Section 3.5 contemplates only the situation where Defendants inadvertently sue a third party. Section 3.5 does not protect Defendants when they disregard the GSLA and sue Valve itself. Thus, it cannot foreclose Valve’s breach of contract claim as a matter of law.

Fourth, Defendants’ make the dubious claim that when the Meyler Defendants sent the

June 2023 Demand Letter to Valve, it was “[u]nknownst to” them that the ’221 Patent was covered under the GSLA. Dkt. 27, at 7. Valve alleged that the Meyler Defendants were aware of the terms of the GSLA when they sent the June 2023 demand letter to Valve. *Id.*, ¶ 30. These allegations must be taken as true and cannot be contradicted in Defendants’ motion with unsupported attorney argument. *Retail Prop. Tr.*, 768 F.3d at 945. Moreover, Defendants’ self-serving statement is belied by the simple fact that the ’221 Patent is identified on the face of the GSLA as a licensed patent. Dkt. 23-1 at 19. The Meyler Defendants represented the other Defendants for over a year (Dkt. 23, ¶¶ 21-28) and during that time were send a copy of the GSLA by Valve twice, in October and December 2022 (*id.*, ¶ 23). If the Meyler Defendants did not know that the ’221 Patent was covered under the GSLA, the only reasonable conclusion based on the allegations in the Complaint is that the Meyler Defendants did not review the GSLA prior to sending the June 2023 demand letter and thus violated at least Washington Rule of Professional Conduct 2.1. *Cf. id.*, ¶¶ 31-32.

Because Valve plausibly alleged actual and anticipatory breach of contract against both RBDS and Display Technologies, Valve’s allegations against Leigh Rothschild are also sufficient.

The Court cannot credit Defendants’ self-serving statements made for the first time in its motion to dismiss over Plaintiff’s well-pleaded allegations in its Complaint. Therefore, Defendants’ motion to dismiss Count III should be denied.

C. The Complaint Plausibly Alleges a Violation of Washington’s Patent Troll Prevention Act

1. Defendants Ask the Court to Improperly Weigh Evidence at the Pleading Stage

Defendants’ arguments for dismissal of Count IV amount to nothing more than a request to have the Court weigh evidence, which is inappropriate at this stage in the case. *See, e.g.*, Dkt. 27 at 16 (“When all of the factors showing good faith are *properly weighed*, the only reasonable conclusion that can be drawn is that Defendants’ assertion of infringement of the ’221 patent was made in good faith.” (emphasis added)). At this stage in the case, however, the Court must accept Valve’s allegations as true. Any weighing of factors is only appropriate after discovery.

1 *See, e.g., Gunn v. Drage*, 65 F.4th 1109, 1120 (9th Cir. 2023) (“[W]here a defendant
 2 asserts “a factual challenge,” courts must treat the motion to strike as “a motion for summary
 3 judgment,” triggering discovery.”). It is inappropriate to weigh Defendants’ bad faith actions
 4 against any good faith actions (which are nowhere to be found in Valve’s complaint) at the
 5 pleading stage.

6 Moreover, Defendants argue that because Valve failed to address the “good-faith” factors
 7 at all, it has not pleaded a claim upon which relief can be granted. No court has held that such
 8 factors must be mentioned in the complaint to plausibly plead a claim for violation of the Patent
 9 Troll Prevention Act. Nor have Defendants adduced any reason “good-faith” factors would be
 10 required. Defendants’ unsupported argument should be rejected.

11 2. Defendants Mischaracterize Valve’s Complaint

12 In addition to their request to improperly weigh the enumerated factors of the Patent Troll
 13 Prevention Act, Defendants repeatedly mischaracterize the allegations made in Valve’s complaint
 14 in an attempt to distance themselves from their repeated bad-faith threats against Valve.

15 *First*, Defendants allege that they cannot meet RCW 19.350.020(2)(f) because “[a]s
 16 conceded in the FAC . . . no court has ever found Defendant’s assertions of infringement to be
 17 without merit or containing false, misleading, or deceptive information.” Dkt. 27 at 15. Valve did
 18 not so concede. Valve only noted that Defendants’ assertions *of the ‘221 Patent* had not yet been
 19 found to be meritless, due to Defendants’ litigation strategy of avoiding any substantive decisions
 20 on the merits of its allegations. The Complaint sets forth facts that confirm that “courts have found
 21 that patent claims made by other Rothschild-controlled entities are without merit” and one court
 22 “found [Rothschild’s assertions of patent infringement] to be so lacking in merit that it awarded
 23 fees to the opposing party.” Dkt. 23, ¶ 89(b); Dkt. 23-3 at 3 (“And Rothschild has been hit with fee
 24 awards for filing objectively baseless lawsuits against defendants who clearly did not infringe his
 25 patents.”). RCW 19.350.020(2)(f) considers not just the actions of Defendants but their
 26 subsidiaries and affiliates. Valve’s allegations that claims made by Rothschild’s subsidiaries and
 27 affiliates have been found meritless must be taken as true and are relevant under Factor (f). *See*,

1 *e.g., Iten v. Los Angeles*, No. 22-55480, 2023 WL 5600292, at *3 (9th Cir. Aug. 30, 2023) (“We
2 assume all [Plaintiff’s] allegations to be true and draw all reasonable inferences in his favor.”).

3 Defendants also assert, without analysis or support, that a case involving a different
4 Rothschild entity and different patent is *per se* not “based on the same or substantially equivalent
5 assertion of patent infringement.” Dkt. 27 at 15. Such analysis, however, can only be performed
6 once discovery into the full scope of Defendants’ affiliates’ and subsidiaries’ meritless assertions
7 of infringement is complete. Without the benefit of discovery, it is improper to determine whether
8 such meritless assertions are “the same or substantially equivalent assertion of patent
9 infringement” to Defendants’ assertion of the ’221 Patent. Valve’s allegations that lawsuits filed
10 by Rothschild affiliates and subsidiaries have been found without merit are relevant to a
11 determination of whether a violation of the Patent Troll Prevention Act has occurred. Valve’s
12 allegations are plausible on their face and will be further refined as Valve seeks discovery into
13 Defendants’ “pattern of litigation abuses characterized by the repeated filing of patent
14 infringement actions for the sole purpose of forcing settlements, with no intention of testing the
15 merits of one’s claims.” *Rothschild Connected Devices Innovations, LLC v. Guardian Prot. Servs.,*
16 *Inc.*, 858 F.3d 1383, 1390 (Fed. Cir. 2017).

17 *Second*, Defendants attempt to recast Mr. Meyler’s June 2023 Demand letter as a “clerical
18 error” rather than a bad-faith assertion of patent infringement. Again, Defendants assertions are
19 self-serving, unsupported by evidence, and mischaracterize the allegations in the complaint. *See,*
20 *e.g.,* Dkt. 23, ¶¶ 82, 87-90. Valve’s allegations of bad faith must be taken as true. *See, e.g., Iten,*
21 *2023 WL 5600292, at *3.* Nor can the Court consider Defendants’ assertions extrinsic to the
22 Complaint. *Jones v. L.A. Cent. Plaza LLC*, 74 F.4th 1053, 1059 (9th Cir. 2023) (“[W]hen
23 presented with ‘matters outside the pleadings’ in connection with a motion to dismiss for failure to
24 state a claim under Rule 12(b)(6) . . . , the district court may choose to exclude such extrinsic
25 matters and address the motion under the applicable Rule 12 standards, or it may convert the
26 motion into “one for summary judgment under Rule 56.”).

27 Valve has alleged that Mr. Meyler knew of the GSLA prior to sending the June 2023
28

1 Demand Letter, and that he was sent a copy of the GSLA by Valve. Dkt. 23, ¶ 89(c). Valve also
 2 alleged that Mr. Meyler’s twice-repeated tactic of seeking additional money for a license to a
 3 patent already covered by the GSLA amounts to bad faith assertion of patent infringement. Dkt.
 4 23, ¶¶ 89-90. Accepted as true, these well-pled allegations are evidence of bad-faith patent
 5 infringement under RCW 19.350.020(2)(g) and are sufficient to “state a claim to relief that is
 6 plausible on its face.” *Ashcroft*, 556 U.S. at 678.

7 In sum, none of Defendants’ arguments regarding the Patent Troll Prevention Act go to the
 8 sufficiency of Valve’s allegations or allege that Valve is legally barred from seeking relief under
 9 the Patent Troll Prevention Act. Instead, Defendants attempt to contradict factual allegations in the
 10 Complaint, identify factual disputes that are best explored during discovery, and ask the Court to
 11 weigh factors based on a completely undeveloped record. These arguments are insufficient to
 12 overcome Valve’s factual allegations in the Complaint, taken as true.

13 Defendants’ motion to dismiss Count IV should be denied.

14 **D. Valve Has Stated a Claim Against the Myler Defendants**

15 1. The Meyler Defendants Cannot Invoke the Litigation Privilege

16 The litigation privilege cannot provide the Meyler Defendants absolute immunity from
 17 abuse of the legal system as contemplated in the Patent Troll Prevention Act. Doing so would
 18 violate the public policy considerations underlying the privilege and undermine the integrity of the
 19 judicial process. Further, the litigation privilege does not apply to Valve’s allegations against the
 20 Meyler Defendants because they are not “statements made in the course of a judicial proceedings.”
 21 *Young v. Rayan*, 533 P.3d 123, 128 (Wash. Ct. App. 2023) (emphasis added). The litigation
 22 privilege does not extend to private communications between two private parties when there is no
 23 pending litigation.

24 *First*, litigation privilege should not extend to allegations under Washington Patent Troll
 25 Prevention Act. Courts have excluded from the scope of the litigation privilege allegations against
 26 attorneys “for the tortious use of the legal process,” including claims of abuse of process or
 27 malicious prosecution. *Scott v. Am. Express Nat’l Bank*, 22 Wash. App. 2d 258, 265, *review denied*,

200 Wash. 2d 1021 (2022) (explaining that litigation privilege does not extend to malicious prosecution or malicious use of the legal system); *see also Mason v. Mason*, 19 Wash. App. 2d 803, 835 (2021), *review denied*, 199 Wash. 2d 1005 (2022) (“Consequently, litigation privilege does not apply, and an attorney can be liable for abuse of process . . .”). Washington’s Patent Troll Prevention Act is exactly the type of tortious use of the legal process that has been excluded from the litigation privilege. The Washington Legislature passed the Patent Troll Prevention Act to “protect Washington’s economy from abusive and bad faith assertions of patent infringement.” RCW 19.350.005. These “abusive and bad faith assertions of patent infringement” are nearly identical to the abuse of process and malicious prosecution claims that Washington courts have declined to immunize attorneys from. Like an abuse of process claim, integral to a violation of the Patent Troll Prevention Act is “abusive” and “bad faith” conduct, which is “not related to the *legitimate* purposes of a judicial proceeding.” *Mason*, 19 Wash. App. 2d at 835 (emphasis added).

The public policy underlying litigation privilege would not be served by allowing the Meyler Defendants to invoke such broad absolute privilege to avoid liability for violating the Washington Patent Troll Prevention Act. Immunizing the Meyler Defendants from violation of the Patent Troll Prevention Act would immunize them from “misappropriate[ing] a judicial proceeding to achieve an improper and extrinsic end,” which “neither preserves ‘integrity of the judicial process,’ nor ‘further[s] the administration of justice.’” *Id.* at 837 (second alternation in original) (internal citations omitted). Moreover, because of the “extraordinary scope” of the litigation privilege, courts will not apply the litigation privilege where there are no “safeguards to prevent abuse of the privilege.” *Story v. Shelter Bay Co.*, 52 Wash. App. 334, 338, 760 P.2d 368, 371 (1988) (holding that absolute privilege does not extend to “proceedings which, although official and public, are not judicial in substance, as a nonjudicial forum may lack safeguards to prevent abuse of the privilege”). Therefore, “absolute privileges have been limited to situations in which authorities have the power both to discipline persons whose statements exceed the bounds of permissible conduct and to strike such statements from the record.” *Moore v. Smith*, 89 Wash. 2d 932, 937, 578 P.2d 26, 29 (1978); *see also Mason v. Mason*, 19 Wash. App. 2d 803, 832 (2021), *review denied*, 199 Wash.

2d 1005 (2022) (“Safeguards inherent to the judicial process, such as swearing an oath, cross-examination, and the threat of perjury, ensure the reliability of testimony.”).

No such safeguards would apply to the statements of the Meyler Defendants alleged in this action if the claims are dismissed against them. If the Myler Defendants were given absolute privilege from litigation for all private communications made outside of any pending judicial proceeding, there would be essentially no safeguards to prevent such abuse of that absolute privilege. *Story*, 760 P.2d at 371. In light of these lack of safeguards and consistent with courts’ exclusion of similar abuse of process claims, the Court should find that the litigation privilege does not apply to the Meyler Defendants’ violation of the Washington Patent Troll Prevention Act.

Second, the Meyler Defendants communications in the June 2023 demand letter were not made during the course of any litigation or judicial proceeding, as alleged in the Complaint. Dkt. 23, ¶ 86 (“To avoid any doubt, [the June 2023] demand letter was a private communication between two private parties outside of the context of any judicial or quasi-judicial proceeding.”). Nor did Defendants identify any connection to any actual judicial proceeding that these communications were allegedly related to. Dkt. 27 at 19. “[S]tatements made during an occasion outside a judicial proceeding are not covered.” *Kurczaba v. Pollock*, 318 Ill. App. 3d 686, 706 (2000). Valve’s allegation that the Meyler Defendants’ communications were outside the context of any judicial or quasi-judicial proceeding must be taken as true.

Moreover, Defendants have not cited a case where the litigation privilege was applied to statements or actions made when there was no pending litigation or judicial proceeding. Indeed, Defendants only cite two cases that allegedly state the proposition that litigation privilege may apply to “communications preliminary to a proposed judicial proceeding.” Dkt. 27 at 18. However, neither of those cases support the extension of the litigation privilege doctrine that Defendants advocate for here. In *Engelmohr*, the Supreme Court of Washington held that a statement made before an administrative body that was not conducted in a quasi-judicial proceeding did **not** have the benefit of the absolute litigation privilege. *Engelmohr v. Bache*, 66 Wash. 2d 103, 107 (1965). In *Demopolis*, allegedly defamatory statements made outside the courtroom but during the

pendency of court proceedings were also not found to be privileged. *Demopolis v. Peoples Nat. Bank of Washington*, 59 Wash. App. 105, 110 (1990) As the Court in *Demopolis* acknowledged, “an absolute privilege is allowed only in ‘situations in which authorities have the power to discipline as well as strike from the record statements which exceed the bounds of permissible conduct.’” *Id.* (quotation omitted). Here, none of the Myler Defendants’ actions or statements were made in the context of a judicial or quasi-judicial proceeding, nor were they made in a situation in which authorities had the power to strike the statements. Thus, the statements should not be given absolute privilege. Dkt. 23, ¶ 86.

The text of the Patent Troll Prevention Act is consistent with limiting the litigation privilege to applying only to statements made during an active litigation or judicial proceeding. The Patent Troll Prevent Act includes in its definitions “[s]ending or delivering a demand to a target,” “[t]hreatening a target with litigation,” and “otherwise making claims or allegations.” RCW 19.350.010(1)(a)-(d). These examples are precisely the extra-judicial actions taken by the Meyler Defendants (who, as alleged in the Complaint, has access to and was aware of the terms of the GSLA when they sent the June 21, 2023 demand letter to Valve (Dkt. 23, ¶ 23, 29-30)) on behalf of the other Defendants. Dkt. 82-90. The Patent Troll Prevent Act excludes from the definition of “Assertion of patent infringement” allegations “made in litigation against a target” because those assertions are the type of statements that would likely be covered under the litigation privilege. RCW 19.350.010(1)(d) (emphasis added).

Adopting Defendants’ interpretation of litigation privilege would allow an attorney to shield themselves from all repercussions for both their speech and actions merely by claiming it was related to “their representation of their clients and communication(s) on behalf of their clients.” Dkt. 27 at 19. That is not the law. *See, e.g., US Dominion, Inc. v. Powell*, 554 F. Supp. 3d 42 (D.D.C. 2021), *appeal dismissed sub nom. US Dominion, Inc. v. My Pillow, Inc.*, 2022 WL 774080 (D.C. Cir. Jan. 20, 2022), *cert. denied sub nom. MyPillow, Inc. v. US Dominion, Inc.*, 143 S. Ct. 294 (2022) (denying defendant Sydney Powell’s motion to dismiss defamation claims related to the

2020 presidential election because “an attorney’s out-of-court statements to the public can be actionable, even if those statements concern contemplated or ongoing litigation.”).

To the extent Defendants now attempt to create a fact dispute regarding the context of the Meyler Defendants’ communications, that is inappropriate to resolve at the pleading stage without the benefit of discovery. *Gunn*, 65 F.4th at 1120 (“[W]here a defendant asserts “a factual challenge,” courts must treat the motion to strike as “a motion for summary judgment,” triggering discovery.”). Further, to the extent there is any question of whether the litigation privilege should apply, the application of the litigation privilege is fact intensive and should not be resolved at the motion to dismiss stage. *See, e.g., Demopolis*, 59 Wash. App. at 111(1990) (“Resolution of the issue is hampered by the lack of a record from the estate litigation, and by the fact-specific nature of relevant decisions from this and other jurisdictions.”) (collecting cases).

Defendants’ motion to dismiss the Meyler Defendants should be denied.

2. Valve Voluntarily Dismisses Without Prejudice Count V: Conspiracy to Commit Violations of Washington Patent Troll Prevention Act

The parties filed a joint stipulation to amend the complaint to remove Count V: Conspiracy to Commit Violations of Washington Patent Troll Prevention Act and to agree that the parties’ briefing on Valve’s First Amended Complaint (Dkt. 27, Valve’s Response, and Defendants’ Reply) shall apply to the allegations and claims in the Second Amended Complaint and that no further briefing on Valve’s Second Amended Complaint will occur.

Valve’s Second Amended Complaint renders moot Defendants argument that the parties cannot be co-conspirators (Dkt. 27 at 17-18) and that Defendants’ actions were consistent with a lawful or honest purpose (*id.* at 20). Moreover, even if considered on the merits, Defendants’ argument that they acted with “lawful and honest purpose” is merely another attempt to dispute Valve’s allegations in the complaint relying on only unsupported attorney argument and should be rejected. *Retail Prop. Tr.*, 768 F.3d at 945.

E. The GSLA Explicitly Authorizes Valve to Seek Damages

Defendants’ argument yet again misdirects the Court to an inapplicable and irrelevant

1 section of the GSLA to argue that Valve is not entitled to any damages for any claim in this case
2 against any Defendant. Dkt. 27 at 21. This argument fails.

3 Section 6.2 of the GSLA confirms that Valve may seek damages for breach of the GSLA,
4 including the damages sought by Valve in this case: “the Parties reserve all rights and remedies,
5 including damages and equitable relief, for breach of this Agreement by the other Party.” Dkt. 23-
6 1 at 7, ¶ 6.2. Section 6.2 confirms that “nothing herein . . . prevents any Party from enforcing the
7 terms and conditions of this Agreement against the other.” *Id.* Defendants misdirect the Court to
8 Section 9.5 which involves damages and liabilities “arising out of, or in connection with, this
9 Agreement.” Dkt. 27 at 21 (quoting Dkt. 23-1 at 11, ¶ 9.5). On its face, Section 9.5 deals with
10 damages and liabilities incurred through *compliance* with the terms of the Agreement—not
11 breach. The GSLA expressly and unambiguously permits damages and equitable relief for breach.

12 To the extent there is any ambiguity in the Agreement language, it would be inappropriate
13 to resolve that ambiguity at the motion to dismiss stage. *Bedrosian v. Tenet Healthcare Corp.*, 208
14 F.3d 220 (9th Cir. 2000) (unpublished opinion) (“Resolution of contractual claims on a motion to
15 dismiss is proper if the terms of the contract are unambiguous.”). Any such ambiguity should
16 benefit from the parties being able to take discovery on these issues.

17 The only case cited by Defendants supports denial of dismissal. *Negrel v. Drive N Style*
18 *Franchisor SPV LLC*, No. SACV1800583JVSKESEX, 2018 WL 6136151, at *5 (C.D. Cal. Aug.
19 27, 2018). The *Negrel* court did not resolve issues of contract interpretation at the pleading stage.
20 Instead, in *Negrel*, defendants moved to dismiss plaintiff’s claims for punitive, exemplary,
21 incidental, special, and consequential damages as waived under the Franchise Agreement. *Id.* at
22 *5. Plaintiff disputed that such damages were waived because any waiver provision in the
23 Franchise Agreement are unconscionable and unenforceable and prohibited by state law. *Id.* At the
24 pleading stage, the court resolved only the fact that the waiver provision of the Franchise
25 Agreement was inconsistent with California Civil Code § 1668. *Id.* at *7-8. The court declined to
26 resolve whether a contract clause was unconscionable at the dismissal stage. *Id.* at *6 (noting that
27 the analysis of unconscionability is “highly fact-specific”). Similarly, any resolution of allegedly
28

ambiguous contract language is also highly fact-specific and should not be resolved without the opportunity to develop evidence.

Defendants' motion to dismiss Count III should be denied.

F. Should the Court Grant in Full or in Part Defendants' Motion, Valve Should Be Granted Leave to Amend

Should the Court grant in full or in part any of Defendants' arguments, such a grant should be without prejudice and allow Valve leave to amend the Complaint. *Olympus Spa v. Armstrong*, No. 22-CV-00340-BJR, 2023 WL 3818536, at *18 (W.D. Wash. June 5, 2023) (granting leave to amend because there was no bad faith, undue delay, or prejudice to defendants given the early nature of the proceedings and cannot say that the amendment would be futile).

III. CONCLUSION

Defendants' motion to dismiss is based on identifying factual disputes that should not be resolved at the pleading stage and misdirecting the Court to irrelevant contract terms and legal. Each of Defendants' arguments should be denied.

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Respectfully submitted,

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